

of the respondents' side the salary should have been \$448.71 which did not appear to be disputed. Considering all these and the general inflationary situation, we agree with the learned trial judge that \$350 per month would be a fair average figure for the pre-trial period.

As regards interest for pre-trial loss, *Cookson's*⁽¹⁾ case did not decide that the interest should invariably be 3%. Lord Diplock in his summary at page 612 said:—

"2. Interest on the pre-trial loss should be awarded for a period between the date of death and the date of trial at half the short term interest rates current during that period."

In the present case, neither side adduced evidence as to what the rates were during any of the relevant years 1973-79. In any case, judging from the rates of such interest during the past few years, we would consider that 4% is a reasonable average figure for half the short term rates during those years. The increase by the trial court of the deceased's earnings from \$445 or from \$448.71 according to the respondents' side to \$450 per month in the calculation of future loss should be considered as marginal. The learned trial judge must have taken into account other fringe benefits which a Government servant normally receives. Further, looking at the case as a whole and, considering particularly that the learned trial judge has cut down the years of purchase for future loss from 20, asked for by the respondents' side, to 14½ years close to the figure asked for by the appellant, we are satisfied that the generosity shown by the learned trial judge in the circumstances of this case is indeed in favour of the appellant. We consider 20 or at least 18 years' purchase would be more reasonable for this case.

We dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Chan & Chia; Murphy & Dunbar.*

LAM WAI HWA & ANOR. v. TOH YEE SUM & ORS.

[F.C. (Raja Azlan Shah C.J., Syed Othman & Salleh Abas F.JJ.)
October 1, 1980, February 21 & April 13, 1981]
[Kuala Lumpur — Federal Court Civil Appeal No. 97 of 1979]

Family Law — Chinese Marriage — Chinese man married according to Chinese custom — Subsequently marrying another Chinese woman according to Chinese custom — Whether second marriage valid — Second marriage registered under Registration of Marriages Enactment — False statement to Registrar — Does not affect validity of marriage — Whether claim to share in estate of deceased statute-barred — Whether Chinese polygamous — Whether appellant secondary wife of deceased Chinese man — Limitation Ordinance, 1953, s. 23 — Registration of Marriages Enactment (F.M.S. Cap. 111), s. 8.

Customary Law — Chinese Marriage — Subsequent marriage to another Chinese woman according to Chinese custom — Validity of second marriage.

Practice and Procedure — Limitation — Claim to share in estate of deceased — When time begins to run — Limitation Ordinance, 1953, s. 23.

In this case the deceased a Chinese had married the first appellant according to Chinese custom. On his death the first appellant obtained letters of administration to his estate.

A The deceased had married the first respondent, while his first marriage was still subsisting. The marriage was conducted according to Buddhist rites and was registered under the Registration of Marriages Enactment. The deceased in his lifetime gave a monthly allowance for the maintenance of the first respondent and her children and after his death in 1960 this was continued until 1975. When the respondent discovered that she and her children were left out as beneficiaries of the deceased's estate, she applied to the court for a declaration that she was entitled to share in the estate. The appellants contended (a) that the first respondent's marriage to the deceased was null and void; and (b) that the claim was caught by the statute of limitation. Suffian L.P. sitting in the High Court held that the marriage was valid and also that the claim was not statute-barred. The appellants appealed.

C Held, dismissing the appeal: (1) even although the deceased made a false statement when he registered the marriage with the first respondent, this did not affect the validity of the marriage;

(2) Chinese marriages in Malaysia are polygamous and in this case on the facts the union of the first respondent with the deceased constituted a valid secondary marriage and the first respondent was therefore a secondary wife of the deceased;

D (3) the claim was not statute-barred as time began to run from the time the first respondent and her children ceased to be treated as beneficiaries by the appellants.

Cases referred to:—

(1) *In re Lee Gee Chong* [1965] 1 M.L.J. 102.

(2) *The King v. Sim Boon Lip* (1901) 7 S.S.L.R. 4.

(3) *Tan Ah Bee v. Foo Koon Thye & Anor.* [1947] M.L.J. 169.

E FEDERAL COURT CIVIL APPEAL.

G.T. Rajan for the appellants.

Wong Soon Foh for the respondents.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): The appellants are the administratrixes of the estate of one late Tong Poh Hwa (hereinafter called the deceased) who died on December 22, 1960; letters of administration having been granted to them on August 24, 1961 in K.L. High Court Petition No. 196 of 1961. The first appellant is the widow of the deceased. He married her on May 11, 1947 according to Chinese rites. There are seven children, two boys and five girls born out of this marriage.

H Five years later on December 17, 1952 whilst the marriage was still subsisting the deceased married the first respondent. The marriage was conducted according to Buddhist rites and was registered on February 21, 1953 under the Registration of Marriages Enactment (F.M.S. Cap. 111). The other four respondents are the children begotten of this marriage. In contemplation of the marriage the deceased and the first respondent signed a marriage agreement on December 3, 1952, whereby the deceased undertook to pay at least \$300 monthly allowance for her maintenance and support, and would continue to pay this sum even if he had forsaken or deserted her. The deceased also undertook to execute a marriage settlement to provide her with a share of his property. The deceased died without making such settlement.

I After the deceased died the first respondent regularly received the maintenance sum of \$300 per month from the estate of the deceased and from 1968 this was paid from the fund of one of the family com-

panies of which the deceased was a shareholder. Generously enough in 1972 this sum was increased to \$700 per month and the maintenance was regularly paid until July 24, 1975, after which no more allowance was received by her. On discovering that she and her children were left out as beneficiaries of the deceased's estate, the first respondent and her children applied to the court by originating summons for a declaration that they are entitled to share in the said estate and for an order that the appellants do deliver full financial statements and accounts of the estate from the date of the deceased's death to the present date.

Replying to the respondents' application, the appellants contended that the first respondent's marriage to the deceased was null and void and as such she and her children (the other respondents) are not entitled to share in the estate. The appellants also contended that the originating summons was caught by the statute of limitation. These contentions were overruled by the Lord President, who heard the summons in the court below, sitting as a High Court Judge.

Before us counsel for the appellants repeated these submissions. He argued that the deceased's marriage to the first respondent was invalid because the marriage certificate contains a false statement to the effect that the deceased at the time of his second marriage had no other wife. This statement could not have been true because his marriage to the first appellant was still subsisting. It was therefore submitted that had the Registrar of Marriages known this fact he would not have registered the deceased's second marriage, and so this false statement renders the marriage invalid. In our view this submission completely runs counter to the scope and effect of the Registration of Marriages Enactment. Under the Enactment validity of a marriage does not depend upon its registration. This is clearly stated in section 8 of the Enactment, which is as follows:—

"8. Neither the registration of nor the omission to register any marriage shall affect the validity of the marriage nor shall any error in the particulars recorded nor any omission to record any particulars which ought to have been recorded affect the validity of the registration of the marriage."

The Enactment does not purport to make any marriage (other than Christian and Muslim marriages) to be compulsorily registered on pain of being declared invalid. Registration is purely optional at the instance of the parties. The benefit of registration is obviously to provide a ready means of proving such marriage. This is declared in section 9 of the Enactment, as follows:—

"9. An extract from any register certified by the Registrar under his hand to be a true extract from the register shall be admissible in all courts as evidence that a marriage was contracted between the parties therein named and at the place and time therein specified and in the presence of the persons therein stated to have been present thereat but not of the validity of such marriage; but the court may in the absence of evidence to the contrary presume any marriage registered under this Enactment to have been valid and the onus of proving that there was no such valid marriage shall be on the person who asks the court to believe that there was no such valid marriage."

As to the application of this section to the present case, we agree with the view of the Lord President,

- A who treated the certificate as evidence of the marriage of the first respondent to the deceased and that in the absence of any evidence to the contrary the marriage is presumed valid. The deceased or any one else who furnished the false statement appearing in the marriage certificate may well commit an offence under the Enactment, because he is required to state the truth, but such statement does in no way affect the validity of the marriage. Under section 7, if the Registrar had discovered the true nature of this statement, at the most he would either have refused or postponed registration and might afterwards register it when grounds of objection would have been removed. His refusal to register a marriage does in no way affect the status of the marriage. Only where the marriage is prohibited by the religion of the parties or where it is a Christian or Muslim marriage would the Registrar refuse registration. Thus the question whether the marriage is valid or not will have to be determined by the customary law of the parties. No submission on this point has been addressed to us. So we take it that the personal law of the parties concerned does not prohibit such marriage.
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Further the appellants never denied that the deceased married the first respondent. Indeed they could not possibly deny the existence of the marriage in view of the marriage certificate, the marriage contract entered into by the deceased before his marriage to the first respondent and also the regular payments of maintenance allowances for 14 years and the signing of the income tax returns by the first respondent at the request of the first appellant. What they denied, however, is that the marriage was a valid one; but no attempts were made by them to show us other than the erroneous statement in the marriage certificate which we have discussed above that the marriage was invalid. Thus for the reasons stated above we agree with the Lord President that the submission on the invalidity of marriage fails.

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As regards the second argument, we agree with the Lord President that this case is a claim to share in the personal estate of the deceased Tong Poh Hwa, who in his life-time had two wives. As the first respondent was not paid any maintenance allowance since July 24, 1975, it is fair to conclude that as from that date she and her children ceased to be treated as beneficiaries by the appellants, and it is only from this date the twelve years period under section 23 of the Limitation Ordinance No. 4 of 1953 began to run. Even if time began to run from 1968 when maintenance allowance ceased to be paid from the estate, but paid from the fund of a family company, the claim is still well within time because the originating summons was instituted on April 22, 1978.

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For reasons stated above, we dismiss the appeal with costs.

- I *The same Court delivered a Supplementary Judgment on April 13, 1981:*

After the judgment in the above case was delivered we feel bound to write this supplementary judgment by correction slip in view of a letter written by counsel for the appellant pointing out to an error in our judgment wherein we said that no submission was

addressed to us on the validity or otherwise of respondent's marriage to the deceased under the customary law of the parties when in fact counsel said he did make such submission. Upon consideration of the submission we do not think that it makes any difference to the conclusion we have already reached in this appeal.

The gist of the counsel's submission is that the respondent's marriage to the deceased was not valid as a secondary wife because she did not fulfil the conditions of secondary wife as stated in *In re Lee Gee Chong (deceased)*.⁽¹⁾ He also submitted that the relationship of the deceased with the respondent was a bigamous relationship rendering the deceased liable to be prosecuted for an offence of bigamy under section 494 of the Penal Code. In short, the marriage of the respondent was not valid.

As regards bigamous relationship, the submission was based on an old case of *The King v. Sim Boon Lip*⁽²⁾ wherein it was held that a Chinaman could be convicted of bigamy if the prosecution could prove by Chinese law that the second marriage was void by reason of taking place during the life time of the first wife. In that case the Chinese law which was proved by the prosecution was the law which was in practice and observed in China and the evidence was given by Acting Consul General for China stationed at Singapore. According to this witness whose evidence was accepted by the jury, the Chinese law did not allow polygamy although it permitted concubinage. It was on this basis that the jury found the accused guilty. In our view this case is of doubtful value and cannot be an authority for the proposition that a Chinaman's marriage is monogamous because in a number of cases it was decided in this country a Chinaman can validly take secondary wives besides the principal wife and concubines provided a certain condition is fulfilled. It is sufficient for this purpose to refer to the following two cases. The first case is *Tan Ah Bee v. Foo Koon Thye & Anor.*⁽³⁾ in which Carey J. said:

"It is established that a Chinese man may have as many wives as he may be disposed to. Usually he has a principal wife and may have several secondary wives as well. No precise ceremony of marriage is requisite in the case of a secondary wife, but there must be some evidence of intention and some recognition of the status of wife in order that a secondary marriage may be established."

The second case is *In re Lee Gee Chong (deceased)*.⁽⁴⁾ This is the decision of the Federal Court at a time when Singapore was part of Malaysia. In this case Wee Chong Jin C.J. (Singapore) after reviewing exhaustively the cases on the subject summarised the position as follows:

"This judgment clearly lays down that the true principle upon which our courts have for almost a century consistently recognised the custom among the Chinese here of polygamous marriages is to prevent injustice or oppression which would result from a failure to do so."

Thus this is a clear statement of the law that Chinese marriages are not monogamous as accepted in *The King v. Sim Boon Lip*, but polygamous. *Sim Boon Lip's* case therefore must be rejected.

The next question is whether the appellant was the secondary wife of the deceased and what evidence

must there be in order to constitute her a secondary wife. It now seems settled that all that is necessary to establish the appellant as the secondary wife of the deceased is for her to show that her union with the deceased was intended to be a permanent one. Although no form of marriage ceremony was necessary to create the position or status of a secondary wife, where such formalities were observed they had weight to support the exercise of such position or status.

In this case not only did the parties celebrate their marriage in a restaurant according to the Buddhist rites and registered the same, they also wrote an agreement. It is clear from this agreement in which they described themselves as husband and wife that they intended no other union than a permanent one. The agreement recited that the respondent and the deceased desired to contract a marriage according to Chinese rites and traditions and had mutually expressed their affection for each other. After the marriage was celebrated in December 1952 the parties lived together in Petaling Jaya. Their union was only severed by the death of the deceased in a road accident on December 22, 1960. Their union resulted in the birth of four children. It was never disputed that these children were fathered by the deceased. In our view a union which lasted for so long and produced not one child but four children could not be other than proof of their intention that they desired a permanent union when they signed the agreement in December 1952. Any other conclusion will be to fly in the face of the evidence. Thus such being the case, in our view the union of the respondent with the deceased constituted a valid secondary marriage, and the respondent was therefore a secondary wife of the deceased.

Appeal dismissed.

Solicitors: G.T. Rajan & Co.; Chooi & Co.

CHAI YEN v. BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION

[F.C. (Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J. & Abdoolcader J.) March 25 & April 14, 1981]

[Kuala Lumpur — Federal Court Civil Appeal
No. 143 of 1976]

Land Law — Charge of lands — Application for sale of lands charged — Allegations of fraud and undue influence — Annexure to charge not signed by parties — National Land Code. s. 256.

In this case the appellant had executed charges in favour of the respondent and on failure to pay the amount due, the respondent applied for the sale of the lands. The appellant alleged fraud and undue influence and applied for a stay pending the disposal of a suit in regard to a guarantee given by the appellant. The learned trial judge gave judgement for the respondent. The appellant appealed.

Held: in the circumstances of this case the learned judge was justified in finding no basis for the allegations of fraud and undue influence made by the appellant and also in rejecting the contention raised with regard to the consolidation of the accounts. The learned judge was also correct in rejecting the argument that the summons for an order for sale in these proceedings should be stayed pending the disposal